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**ELEVATE THE DIRECTOR OF THE INDIAN HEALTH
SERVICE TO ASSISTANT SECRETARY FOR
HEALTH AND HUMAN SERVICES
TRIBAL TRUST FUND ACCOUNTS**

JOINT HEARING

BEFORE THE

**COMMITTEE ON INDIAN AFFAIRS
UNITED STATES SENATE**

AND THE

**COMMITTEE ON RESOURCES
UNITED STATES HOUSE OF
REPRESENTATIVES**

ONE HUNDRED FIFTH CONGRESS

SECOND SESSION

ON

S. 1770

**TO ELEVATE THE POSITION OF DIRECTOR OF THE INDIAN HEALTH
SERVICE TO ASSISTANT SECRETARY OF HEALTH AND HUMAN SERV-
ICES, TO PROVIDE FOR THE ORGANIZATIONAL INDEPENDENCE OF
THE INDIAN HEALTH SERVICE WITHIN THE DEPARTMENT OF
HEALTH AND HUMAN SERVICES**

AND

H.R. 3782

**TO COMPENSATE CERTAIN INDIAN TRIBES FOR KNOWN ERRORS IN
THEIR TRIBAL TRUST FUND ACCOUNTS, TO ESTABLISH A PROCESS
FOR SETTLING OTHER DISPUTES REGARDING TRIBAL TRUST FUND
ACCOUNTS**

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So we strongly support Assistant Secretary for Indian Health.

Mr. ROLIN. We do, likewise. And let me just use an example, my tribe and within my area. We use a lot of the Commission Corps working within our various health programs. For example, in my program, our clinic director is a Commission Corps officer. So we see the role of the Commission Corps expanded in to work very closely within the tribal programs in our Indian communities.

In some cases, the Commission Corps are the health providers in some of the areas, the very rural areas, where the health programs are offered to our Indian people. Therefore, we see the Corps continuing to be a very valuable part of our health program.

Ms. CHRISTIAN-GREEN. Thank you for your answers. I don't have any other questions.

Senator MCCAIN. Thank you very much, Representative Green. Thank you all for being here this morning, and we appreciate the fact that you came all this way. As you mentioned, it's been 6 years, perhaps we can get it done this year and move on to other issues that affect Indian health which are very important.

I thank you all for coming.

Our next panel is Kevin Gover, who's the Assistant Secretary for Indian Affairs, who's accompanied by Ed Cohen, Deputy Solicitor, Office of the Solicitor, Department of the Interior and James Simon, Deputy Assistant Attorney General of the Environment and Natural Resources Division of the Department of Justice; Roland Johnson, who is the Governor of the Pueblo of Laguna; Mark Fox, the Chairman of the Intertribal Monitoring Association on Indian Trust Funds; and John Echohawk, Director of Native American Rights Fund, Boulder, CO.

All the witnesses I have had the privilege of knowing and dealing with in the past, so I welcome them all back before the committee. We'll begin with your testimony.

STATEMENT OF KEVIN GOVER, ASSISTANT SECRETARY FOR INDIAN AFFAIRS, U.S. DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY ED COHEN, DEPUTY SOLICITOR, OFFICE OF THE SOLICITOR, DEPARTMENT OF THE INTERIOR; JAMES SIMON, DEPUTY ASSISTANT ATTORNEY GENERAL, ENVIRONMENT AND NATURAL RESOURCES DIVISION, DEPARTMENT OF JUSTICE; AND HILDA MANUEL, DEPUTY COMMISSIONER FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. GOVER. I also have with me this morning our Deputy Commissioner for Indian Affairs, Hilda Manuel. Let me say first, we're very grateful to the committee for calling this hearing. This is an issue that, as Senator McCain well knows, has been out there for a long time.

We'd like to talk about the progress that we're making on the entire issue, the range of issues concerning trust funds management over the years, and then describe the specific proposal that we put before the two committees today.

First of all, there are three components to the administration's trust funds initiative. The first, and we believe the most important, really looks to the future. It is an effort to reform the entire range of activities that the Department undertakes regarding Indian trust assets. It involves a massive records cleanup of all the records

in the possession of BIA, the Office of the Special Trustee, MMI and everyone else who has anything to do with Indian trust assets.

This initiative has 13 specific and separate tasks that the Secretary has charged to the various bureaus within the Department and we're moving as quickly as possible to implement those reforms.

Second, we've developed some legislation to address one of the key causes of the current difficulties in trust asset management. That legislation will address the problem of fractionated land interests. Some generations since Indian allotments were first made, we now have a very tiny interest in land held by numerous individuals. So that one plot will have several owners, sometimes several dozen owners. And none of those interests representing a viable economic unit.

We have legislation before the Committee on Resources in the House that would address that issue. We look forward to the hearing next week to begin work on that.

That brings us to the matter that's before the committee today: our initiative on tribal trust funds. Let me start by saying what this legislation is not. It is not an effort to resolve every outstanding matter regarding the management of tribal trust funds. Instead, it is directed very specifically to issues that arose in the reconciliation effort that was carried out by the Department pursuant to the 1994 Act.

We have identified a number of known errors where it's clear that there were errors made. More troubling, there are a number of transactions where the proper documentation does not exist for an actual audit of those transactions. Nevertheless, we believe that based on what we do know, and using best estimates of any transactions that are not auditable that we can define a reasonable range of compensation for the account holders, meaning the tribal governments of the country.

I should also emphasize that we do not believe that this legislation will settle each and every one of the accounting claims the tribes may have. Were this legislation to be enacted, I believe that a tribe could find in good faith that its interests are better served by litigating.

However, we believe most of the tribes would benefit from this process simply because it creates an expedited system for putting money that's owed to tribes back into their trust accounts. And that's really what underlies our proposal, is the notion of quick compensation to the best of our ability and only with the agreement of the tribe, the tribal account holder.

So with that, Mr. Chairman, I'm going to ask Ed Cohen, the Deputy Solicitor, to describe the process that the act has in mind.

Senator MCCAIN. Welcome, Mr. Cohen.

STATEMENT OF ED COHEN, DEPUTY SOLICITOR, OFFICE OF THE SOLICITOR, DEPARTMENT OF THE INTERIOR

Mr. COHEN. Thank you, Mr. Chairman.

Our proposal is premised on the notion that we ought to at least try to resolve these claims informally if we possibly can. If we are unable to do so, then we can move ahead to a more formal process. The initial stage would be for the Government to immediately pay

all of its known claims or known errors. These have been calculated by Arthur Andersen. We have been working to refine those numbers. It's our obligation to pay them, and we would pay them immediately, notwithstanding what happens with regard to the rest of the process.

Let me emphasize that this legislation focuses solely on the accounting claims. It does not address any claims that tribes may have with regard to claims relating to the underlying asset management, nor does it purport to address claims preceding 1972. None of those claims would be extinguished, should they exist. But they are not addressed by this legislation.

We would then begin a two-stage process for addressing the other accounting claims. Under the first stage of the process, the Department would offer what we would call a good faith settlement to tribes in which we would, based on a formula, estimate what we think we might owe to tribes as a result of management practices relating to these accounts, and in particular, taking into account circumstances of that tribe's accounts. We would look at how much money went through the accounts, if there were unreconciled transactions, where documentation was missing. We would look at the types of transactions and based on this formula, estimate what a settlement number might be.

We would also attempt to take into account the transaction costs that the Government is saving by not going down sort of future potential litigation and allocate those numbers into the good faith settlement offer as well. It's in our interest to settle as many of these claims as we possibly can at this stage. Because it will save us all a lot of burden. It's also, we think, in the interest of the tribes, because they would not have the burden of distraction and economic investment required to further litigate claims.

So it's in everybody's interest, we think, if we can come to an amicable resolution of those claims, to resolve them informally. In the event that we aren't able to settle them informally, we then move to what we call stage two. And under stage two, we seek to respect the tribes' sovereignty by entering into government-to-government negotiations facilitated by a mediator. This would be non-binding mediation.

The idea would be that we'd sit around the table for 12 months and see if we can work the issues out. If the tribe needed additional information or if analysis was required, it could be requested. And if both sides agreed, it would be done and the Government would pay for it.

The notion here is that perhaps our settlement offer wasn't good enough, the tribe has something else in mind, maybe we can resolve it through informal negotiations of this type.

Those negotiations would be a condition precedent to bringing litigation. In other words, we would want the legislation to require that everybody sit down and resolve this informally before we are burdened with a litigative process.

In the event, however, that we were not able to reach an agreement, we would then move to litigation, and the legislation defines the process of litigation in the court of claims.

Mr. GOVER. With that, Mr. Chairman, our time is up.

[Prepared statement of Mr. Gover appears in appendix.]

Senator McCain. Thank you.
Governor Johnson.

STATEMENT OF ROLAND JOHNSON, GOVERNOR, PUEBLO OF LAGUNA, LAGUNA, NM

Mr. JOHNSON. Thank you very much, Mr. Chairman.

Mr. Chairman and members of the committee, my name is Roland Johnson. I am the Governor of the Pueblo of Laguna, a federally-recognized tribe located in New Mexico approximately 40 miles west of Albuquerque. On behalf of the Pueblo and its 7,630 members, please accept our gratitude for the opportunity to address the committee regarding our views on H.R. 3782.

We are vigorously opposed to this bill for the reason that, I elaborate on. In summary, though, the bill is deceptive and intended to bring bureaucratic and administrative closure to longstanding and ongoing Government mismanagement of tribal trust property. The bill would create a process that by its very design would prohibit tribes from ever getting an accurate accounting of the Government's trust property management.

Essentially, a process would be created and put in place that would facilitate a permanent cover-up. We oppose that approach the strongest possible way. It is our belief that we are entitled to equal justice on a level of equality that the Congress provided all savings and loan account holders, nothing less, nothing more. Our history and our historical relationship to the United States requires this.

The Pueblo Laguna and its people occupy the same land that our ancestors have occupied for centuries, long before the first Europeans set foot on this continent. Those chosen for leadership have always served in such positions in a manner of honor and sacred trust. The leadership of the Pueblo has always been accountable to the people of the Pueblo for the proper care and custody of the lands and common property. This accountability is complete, nothing less is expected or accepted. We view the obligations of the United States in the context of its self-imposed trust duties to be of the same degree of completeness and integrity.

And yet, that is not what we have seen from the Department of the Interior with regard to its administration of trust property and refusal to fully account to the tribal beneficiaries. As a contract to the Department, Arthur Andersen noted in its so-called reconciliation report it provided to tribes, the balances posted for each tribe were not intended to be relied on. The process used was not an audit conducted pursuant to generally accepted auditing standards.

In fact, the scope of the engagement of Andersen was limited at best to an attempt to reconstruct certain historical transactions to the extent practicable for certain years with regard solely to the funds managed by the Bureau of Indian Affairs. Andersen did not have as an objective reconciliation of balances of tribal trust funds. Accordingly, Andersen expressly refused to state an opinion on the accuracy of its so-called findings.

When the results of these accounting exercises were completed and presented to tribes, what did the BIA then demand of each tribe? Indeed, what does H.R. 3782 demand of each tribe?

By design, according to the scheme disclosed to the tribes in a meeting in the Assistant Secretary of the Interior's conference room with the then-Comptroller of the United States, Ed Majure, several years ago, the tribes were to be given numbers for trust fund balances which each tribe was then obliged either to agree or disagree with. And if a tribe was in disagreement, to prove otherwise.

To prove otherwise, a tribe must get access to all records that pertain to its trust funds, wherever such records may be. And yet, the Bureau refuses to give open access to all such records. A tribe that remained in disagreement would then be obliged to sue the Government in the United States Court of Federal Claims. That court has been widely criticized in scholarly law review articles for the manner in which it has treated valid Indian claims.

This proposed legislation would legitimize this unconscionable scheme, and worse, H.R. 3782 goes much further. Inserted in the definitions section of H.R. 3782, under covered claims and deficiencies in management and accounting of tribal trust funds, is language that would sweep within the coverage of this bill, and I quote:

All errors in the management and accounting of tribal trust funds from the point of their collection through disbursement, including but not limited to, collection of the appropriate amounts under lease, permit or sale agreements or other contracts, proper recording of transactions, timely collection of revenues, proper accrual of interest, adequate yield on investments, undocumented roll-forward amounts, delays in the accrual of interest and proper disbursements.

This language has been placed there by design, carefully constructed for the purpose of forever defeating valid tribal claims and covering up the Bureau's mismanagement.

It is our understanding that a private trustee has the legal duty to fully disclose—

Senator MCCAIN. Can I interrupt just 1 second? I apologize. We have a vote with only a few minutes left on the Floor of the Senate. I have to go over and vote. In the meantime, Representative Green, would you please take over. Thank you very much, Governor, and I'm sorry that I have to go because of the vote.

Mr. JOHNSON. Thank you for your attention.

May I continue?

Ms. CHRISTIAN-GREEN [assuming Chair]. Sure.

Mr. JOHNSON. Thank you.

It is our understanding that a private trustee has a legal duty to disclose fully all such management that a trustee has committed. The Bureau should be held to no less a standard. This bill is so outrageous in the fraud it seeks to perpetuate that this committee is respectfully requested to investigate the drafting of this bill and its presentation to this Congress.

To its credit, Congress did not permit such a response to the savings and loan account holders where the Government had secondary liability as a grantor. Congress should not permit such proposed action as H.R. 3782 includes here, where the Government's liability is primarily due to its own defaultations. Those who have drafted this bill should be required to be accountable for this indecent proposal.

It is my understanding that the committee's hearing record will be kept open for a brief period after today. The Pueblo would like to be able to submit additional and more detailed comments on

H.R. 3782 as the brief time allotted today for oral testimony do not provide sufficient time to go into detail in a lot of our concern. The Pueblo is not only adversely impacted by the mismanagement of its own tribal trust funds, but also approximately 700 members of the Pueblo who are minors and who are IIM account holders.

I thank the committee very much for this opportunity to present testimony.

[Prepared statement of Mr. Johnson appears in appendix.]

Ms. CHRISTIAN-GREEN. Thank you, Governor.

Your request to be able to submit additional and more detailed comments is accepted. I understand there's a period of about weeks, if we could have that additional information within that time, we would appreciate it.

Mr. JOHNSON. Thank you very much.

Ms. CHRISTIAN-GREEN. Thank you for your testimony.

The next panelist is Mark Fox, the Chairman of the Intertribal Monitoring Association.

STATEMENT OF MARK N. FOX, CHAIRMAN, INTERTRIBAL MONITORING ASSOCIATION ON INDIAN TRUST FUNDS

Mr. FOX. Representative Christian-Green, good morning. My name is Mark N. Fox, I am chairman of the ITMA and I also serve as elected representative of our tribal government, the Three Affiliated Tribes at Fort Berthold, ND.

Our association was founded in 1991 to advocate for reform of the Interior Department systems for managing Indian trust funds. ITMA represents nearly 40 tribes.

We would first like to express our appreciation to the two committees who have assisted implementation of the 1994 Trust Fund Reform Act, and the Department of the Interior, aided by the funding and support from Congress, and following the initiatives of the Office of the Special Trustee, has taken the beginning steps to reform the trust fund management system.

The system has a long way to go. We need your continued support. And also, we need continuous input by tribal nations as well. On behalf of ITMA, I have submitted written testimony providing greater detail of our views. And in my oral testimony, I say I want to briefly summarize two things. The first, our reasons for strongly opposing H.R. 3782, and then number two, to identify what we believe are the essential elements of a bill we can support that will hopefully provide adequate compensation to tribes for the mismanagement of our tribal trust assets by the United States.

ITMA, as well as NCAI and others, are on record officially rejecting the Department of Interior's legislative proposal. Our concerns with H.R. 3782 fall in two main areas. Number one, at every stage of the settlement process, the bill tilts the playing field in favor of the Department of the Interior, and does not apply standard trust law principles to the settlement process.

And number two, the bill only compensates the tribes for a very small part of the losses caused by the United States' mismanagement of our tribal trust assets. The bill limits the periods of time for which claims may be made to the period 1972 to the present, the period covered by the Arthur Andersen report, which was not a full accounting. And the bill only covers a small area of possible

mismanagement, the area whether the BIA properly entered deposit and disbursement transaction on a general ledger. And it goes much further than that.

H.R. 3782 would prevent a try from adjusting one of the biggest holes in the trust system, the losses tribes suffered because the BIA never installed an accounts receivable system, and thus has no way of knowing if it collected all the money due on a lease. In short, the bill strips the tribes of many of the rights they now have when litigating trust fund cases against the Government, while giving nothing back in return.

We believe that there should be settlement legislation. However, the Department's bill is not the appropriate answer. We therefore request that Congress discard the Department's bill and begin working from the principles behind the draft legislation ITMA and tribes are prepared to make.

I will briefly summarize a few of the important matters that we would like to see addressed in any final legislation. First, we expect that in any legislation, trust law principles will be applied. This includes the idea that where the trustees records are inadequate, the beneficiaries are permitted to develop a methodology or a model for obtaining a fair and reasonable estimate as to how much was lost.

Also, the burden of proof should be properly placed on the entity responsible for the management of the trust funds, which is the Department of the Interior.

Second, we want the legislation to be comprehensive. It must provide compensation for all the areas and time periods of trust management in which the Department has breached its legal trust responsibilities to the tribes, beginning when the Government first attempted to manage the lands and assets all the way to the present time.

And third, we want the legislation to provide some way to ensure that litigation, where necessary, does not last for decades, and that it is not too costly.

Settlement legislation and lack of records should not be used as an excuse to reduce the Government's liability and escape the consequences of its mismanagement. These are the basic elements.

We would respectfully request the committee's efforts to assist tribes' efforts to work productively with the Secretary toward legislation that will provide a mechanism to put this issue to rest.

As a final comment, Representative Christian-Green, I would like to emphasize the seriousness of this mismanagement. As our national representatives, I know that you have an understanding of the extreme difficulties that we face on reservations. Life is hard on our reservations. But it's even harder and it's worse when you come to understand that resources and revenues that should have gone to tribes in the past have not. And these same types of revenues could have made a difference in the past, and they could make a difference today. We definitely need those, and we're asking for the committee and members of Congress to do the right thing and provide just compensation.

Thank you for the opportunity to testify and I stand ready to answer any questions that you may have.

Thank you.

[Prepared statement of Mr. Fox appears in appendix.]

Ms. CHRISTIAN-GREEN. Thank you, Mr. Fox, for that testimony. Our next witness is Mr. Perego, Attorney.

**STATEMENT OF ROBERT M. PEREGOY, ESQUIRE, SENIOR
STAFF ATTORNEY, NATIVE AMERICAN RIGHTS FUND**

Mr. PEREGOY. Correct, Madam Chairperson. My name is Bob Perego, I'm an attorney with the Native American Rights Fund, and I'm testifying for our executive director, John Echohawk, today.

I do thank you for the opportunity to testify. Before I get into that, I want to apologize to the committee and staff members for not getting the written testimony submitted until this morning, but circumstances simply didn't permit it. So I appreciate your consideration and indulgence in that. I have submitted it for the record, and I will summarize my comments here this morning.

I appear today as the lead attorney for the Native American Rights Fund in the class action litigation *Cobell v. Babbitt*, which was filed over 2 years ago, and is currently pending in the U.S. District Court here in Washington, DC, challenging a century of mismanagement of the Individual Indian Money trust by the U.S. Government.

I think it's important for Congress to realize that Judge Royce Lamberth certified the class in early 1997 to include all past and present beneficiaries of Individual Indian Money trust accounts. Our class therefore today consists of over one half million individual Indians, 500,000 individual Indians. By the census counts, that is about one-fourth of Indian country.

I appear today on behalf of our class to vigorously oppose this legislation which as we have told Interior and Justice is a Trojan horse. Despite the protestations from Mr. Koppelman from Justice that it is not, we will demonstrate and have demonstrated in our testimony here today that this legislation is extremely devious and has ill forebodings for the 500,000 members of our class, as well as for the jurisdiction of the Federal District Court, which we think this legislation could well divest lot of a the jurisdiction over the issues in that case.

We oppose this legislation on three basic grounds. First of all, it seeks to effectuate unconstitutional takings. Second, as I mentioned, it purports to interfere with the jurisdiction of the Federal District Court to completely and comprehensively adjudicate the IIM trust issues in *Cobell*. And third, it portends unconscionably and unlawfully to retroactively amend the American Indian Trust Fund Reform Act of 1994.

Our testimony, please note, is limited on behalf of the individual Indian trust beneficiaries. We respectfully defer to the tribes and ITMA and their representatives regarding any matters in this legislation that relate exclusively to the tribal trust fund issue.

Why have we called this legislation a Trojan horse? Because the Secretary of the Interior and the Assistant Secretary of the Interior have held out to Congress and Indian country and the public for over 2 years that this legislative settlement proposal would be limited to settling tribal trust fund issues. It is not. It goes far beyond that.

At several different times, the Secretary and the Assistant Secretary have issued press releases to the effect that it would not affect the IIM case, because Interior recognized in those press releases that this case was in litigation and that's where it was going to be settled. However, for some unknown reason, after Judge Lamberth ruled in early April of this year that it is likely that the *Cobell* plaintiffs will prevail in this litigation, all of a sudden sections 15 and 16 of this bill somehow show up and purport to adversely affect the rights and interest of over 500,000 Indians in this country.

I would also note that on April 23 of this year, when Secretary Babbitt and Assistant Secretary Gover and Mr. Cohen and others met with Chairman Young and submitted a cover letter to the President of the Senate regarding this legislation, there was no mention made that this would affect the IIM accounts.

This is not the first Trojan horse that the administration has pulled on us this year. There's another one, and it deals with a legislative rider to the Interior appropriations bill that purports to amend the American Indian Trust Fund Reform Act of 1994. We had a meeting with Interior last week regarding the Interior IIM rider, as well as this particular legislation here today.

We have arrived at an agreement with Mr. Cohen at Interior about language that will be submitted into the appropriations bill at the right time that will take care of all our concerns. And we do appreciate Interior's commitment through Mr. Cohen to work with us in good faith to see that offensive language is removed and the agreed-upon provision is put in place.

I also want to acknowledge publicly and thank Chairman Don Young for working with us on this to see that language is ultimately enacted into the Interior bill.

One of the primary concerns that we have, the reason H.R. 3782 is so crazy as it affects the IIM accounts, is because there is no rational basis for including it here. As you all know, the tribal trust fund legislation is based upon a reconciliation of tribal trust funds that was done over the course of the last several years. However, there was never any reconciliation of the IIM accounts. The reason for that is because Interior, by its own admission, has destroyed and lost so many records that it cannot do a reconciliation of IIM accounts.

The Arthur Andersen accounting firm estimated a couple of years ago that it would cost the Government between \$108 million and \$281 million just to begin to reconcile these accounts. And then it would do no good, because of the missing and lost records. Any such effort would be virtually meaningless.

We have elicited deposition testimony in the *Cobell* case here recently where a senior official from the Office of Trust Fund Management testified that it would cost \$2 million just to locate the documents, the relevant IIM documents, for five named plaintiffs in this litigation. Madam Chair, that is \$400,000 per person per account. There are 500,000 IIM accounts. Four hundred thousand times five hundred thousand is \$20 billion.

Now, Interior, it's a matter of public record that Interior's record keeping systems are so notoriously inadequate, that they are the basic cause of the trustee's inability to verify the accuracy of the

IIM account balances. Under the 1994 Trust Fund Reform Act, Congress required the Secretary to issue quarterly account statements to IIM account holders, as well as tribes.

The Director of the Office of Trust Funds Management admitted in deposition testimony in the *Cobell* case that their records are so bad that OTFM cannot verify the accuracy of a single account statement that it sends out. And that's up to a couple million account statements a year. And the Federal Government cannot even verify the accuracy of those statements.

So it's a matter of record that the Interior simply cannot account or verify these IIM trust balances. There was a recent article in the Wall Street Journal here last week that quoted Assistant Secretary Gover in this respect, and I'd like to quote it. It says,

The real question at this point is, are we able to say that the money going into the banking system is the right amount. Can we demonstrate through our records that the right amount has been paid in over time? The answer is no.

The special trustee in the same article described the BIA's IIM trust accounting and management system as an

Obsolete and ineffective system that has lost track of 47,000 account holders.

The special trustee says the BIA has lost a vast majority of leases of Indian-owned land, the major source of Indian income, and stored records in places such as salt mines, where there is no retrieval capacity.

The special trustee aptly summed up the whole problem in the Wall Street Journal article in a very descriptive one-liner. He said:

There are no books.

Equally disturbing to the fact that Interior has lost and destroyed all these records over the years is the fact that they have such a backlog in ownership and title records over four years that they've admitted that a successful billing or income tracking system is never going to be put in place until they're able to bring this information up to date. The problem is, they have destroyed so many records that they never will get there.

I'll go through real quick, Madam Chair—

Ms. CHRISTIAN-GREEN. Yes; if you could wrap up. Please realize that your full testimony will be in the record.

Mr. PEREGOY. I will wrap it up as quickly as I can. And if I'm not doing it, just unplug me.

Getting to the provisions of the bill, there are several provisions in this bill which are outright takings in the tens of millions of dollars, because it requires Treasury and Interior to adjust their books to match basically the account balances in the IIM accounts that are kept by Interior. Now, again, Interior cannot verify the accuracy of any of those accounts.

So there are several provisions in my testimony that are out and out takings of tens of millions of dollars. Right now, the way this bill comes forward here, and yet, Interior tells us this doesn't have anything to do with the IIM accounts.

The second matter which is most egregious is that this bill could impact the jurisdiction of the Federal District Court. This is a complex case, it requires due process, where witnesses can be sworn and testify under oath and be subject to cross-examination. With all due respect, Congress does not have any business interfering

with the jurisdiction of the court in a complex matter such as this, where the rights of one-half million Indians are at stake.

Finally, this bill would portend to amend the Trust Fund Reform Act of 1994 by allowing the Secretary to escape a century of breaches of trust as well as possible future breaches of trust. I would just end by saying that basically what's happening here is that the Secretary is coming hat in hand to Congress trying to pass the buck for the breaches of trust, and asking for Congress' blessings to pardon him for a century of misuse.

Thank you.

[Prepared statement of Mr. Perego appears in appendix.]

Ms. CHRISTIAN-GREEN: Thank you.

I want to thank everyone for their testimony this morning.

The directive of President Clinton that I referred to early also indicates that it would make certain that any actions affecting tribal trust resources have tribal government consideration before a decision is made. So your testimony is important here today.

I do believe that H.R. 3782 is a good faith effort. But certainly in the interest of Native American sovereignty, we need to also take into consideration the Intertribal Monitoring Association's position and their requests to ensure that the rights are not compromised. So it's important that we have your testimony today and that we really continue to work together with the tribal leadership to ensure that a good settlement agreement is reached.

Ms. CHRISTIAN-GREEN: Let me start with questions for Assistant Secretary Gover. Does H.R. 3782 switch the burden of proof to the tribes in the potential trust fund litigation, as was stated earlier, in effect making the tribe produce the evidence when in fact the evidence is under the control of the Bureau of Indian Affairs?

Mr. GOVER. Madam Chair, questions like that are why I brought my lawyers. So I'll ask Mr. Cohen and Mr. Simon to respond to that.

Mr. SIMON. My name is Jim Simon from the Department of Justice. I don't believe that's a fair characterization of what the bill would do. What the bill says is, I think, to restate the current law with respect to accounting. And that is, that when a claim is brought, the court may ask the United States to do an accounting in aid of judgment. And in doing that accounting, the United States can only do what is possible.

And here, as you've heard, because the accounts are missing, what is possible is to provide the reconciliation report. In addition, the Secretary will provide any other information that's identified in the government-to-government negotiations as being relevant, or any other information that the tribe may have they can point to as being relevant.

And when you have all that information together, that's going to end up being all the information that's reasonably available in any reasonable degree of human effort that will relate to the claims of loss. The bill says then the tribes will have an opportunity to take exceptions to that information, to make any legal arguments they want about the degree of loss based on that information, and the court will resolve it.

The bill I think reflects the current law, and also reflects the reality. I wouldn't describe it as shifting the burden of proof.

Ms. CHRISTIAN-GREEN. Let me just ask Governor Johnson or Mr. Fox if they'd like to respond to the question. I know one of you addressed it briefly in your testimony.

Mr. FOX. Exactly, Representative Christian-Green. Despite the way that he has presented it to you and feels that there is no shift of burden, we still believe there is. Because if it's limited, if you appeal the litigation or the steps further in phase two or phase three in the situation, what they have basically said is, we have a reconciliation record here which was produced by Arthur Andersen which in of its own accord, of its own being, has said this is not an accounting. It's an impossibility to do an accounting. It limits the amount of available information that there is.

So what they're saying is, this is all we have, sorry. But tribes, if you've got anything else to counter that, please bring it in. We don't have that information. We don't have those records. They were responsible for keeping them. So that's the problem we have. So the burden does shift. It does shift to the tribes. You have to counter what we produce.

And how do we do that? They spent \$27 million through Arthur Andersen and couldn't even do a basic accounting. So how are tribes with limited resources supposed to come up with this type information or what have you to specifically identify and counter the information that they have, or provide other information that they don't have? We don't have the ability to do so. So there is a shift of that burden, because we're going to be unable to do that.

Ms. CHRISTIAN-GREEN. Governor.

Mr. JOHNSON. Madam Chair, the Pueblo of Laguna has had extreme difficulty availing itself of records in the past. In fact, we have had to file a lawsuit against the Department in order to compel or bring the Department to the table so that we can in fact gain access to records so as to be able to make some kind of an informed decision in this particular matter.

Mr. GOVER. Madam Chair, I think that once you cut through a lot of the rhetoric around this issue, you'll find we're not saying vastly different things. In this particular case, I think there is some confusion, when we talk about the burden of proof, as to just exactly what that is.

The burden of proof has two elements. One is the obligation to bring forward information. The Government is saying, we bring forward what we have. Then the tribes, if they have anything, must bring it forward. That is not a transfer of the burden of proof, or of the burden of persuasion. The bill in no way, in our view, transfers the burden of persuasion to any future litigation. If it does, as we have invited ITMA many times to provide language, to provide the amendment that would prevent that outcome, because it's not what we're trying to do.

Ms. CHRISTIAN-GREEN. It's very unfortunate that a lot of the records are missing. But it's your position that all of the information that you do have, you have made available?

Mr. GOVER. There's one aspect of that issue that Mr. Cohen ought to talk about, having to do with the work records.

Mr. COHEN. The work product records of Arthur Andersen. One of the witnesses said that the Government has refused to give access to all of the records. I don't think that's entirely accurate.

When the reconciliation process was completed, we provided each tribe a copy on electronic disk of all the records that were used that we had that we relied on in producing the reconciliation for the tribes.

The one thing we did not provide were the work papers of Arthur Andersen, who was our contractor. With regard to that, we said, you're welcome to them. You're welcome to come in and see them if you would like. The problem is that the work papers of Arthur Andersen are not segregated by tribe. They have mixed in with them the records of all the other tribes.

In order to make them available and protect the privacy rights of each of the tribes, therefore, they would have to have been redacted to exclude the information not relevant to the particular requestor. The records are Arthur Andersen's. Arthur Andersen was willing to make them available, but at their hourly rate. The special trustee made the determination that rather than spend his very limited money on paying Arthur Andersen their hourly rate, and incidentally, it was a more favorable hourly rate than what they normally charge, but nonetheless, it was a hefty sum, that the limited resources of the special trustee were not best used for that purpose, but for other purposes, such as fixing the system.

Now, I know a number of tribes have objected to this, have said this is unfair, they ought to have access to their work papers. And I understand that argument. The problem is the realities of the world, and that is that there are finite amounts of money, and the question is how best to use that money. The special trustee made the determination that was not a particularly good use of the funds.

But let me reiterate that if any tribe wants access, we're not hiding access to the papers, but we do have this troublesome problem of segregating the records. Obviously, if there were money made available to pay Arthur Andersen to do this, that would be fine with us.

Ms. CHRISTIAN-GREEN. Assistant Secretary Gover, there's another question. How would you respond to the testimony of the Native American Rights Fund that this bill will affect the Individual Indian Money accounts?

Mr. GOVER. We had better have Mr. Cohen address that one.

Mr. COHEN. Madam Chairman, I must say I was somewhat perplexed and frankly upset at that testimony. We met with Mr. Perego, as he indicated, 1 week ago, because we had heard they had these concerns. I thought we had satisfactorily addressed his concerns. Apparently we have not. And we want to go back and work with them to do so.

But let me first note the paragraph on page 5 at the top of Mr. Gover's statement, in which we indicate that is not our intention, to have affected any IIM claims. If we have inadvertently done so, then we should fix the language.

The two areas that he mentioned were first, the appropriations language that related to 17,000 accounts that have a cumulative balance of \$5,000. And the appropriations language as it now stands says, with regard to those accounts, most of which have a balance of 30 cents or less, we need not spend the money to put those accounts into our new system. It's going to cost us \$35 per

account to transfer those accounts to the new system, with 17,000 accounts at \$600,000 to do that.

We were not seeking in any way to deny access of those account holders to their money. In fact, we had agreed with them on substitute language that we would put forth to the appropriations committee to clarify what our intention was. It's language that we wrote, they read, they approved and we sent to OMB. I called their office last night to indicate that it was my understanding that OMB was going to clear the language last night.

So that's the first Trojan horse that he was referring to.

The second is sections 15 and 16 of the legislation. It's very complicated as to what it does. But in English, what it's intended to do is to give the Government the authority to adjust the books so that the Treasury Department's books and the Interior Department's books are aligned. But it does not affect the balances of any individual accounts.

So, I am somewhat hard pressed to understand why he believes that there's a taking. We explained that to him and assured him that if, in reviewing the language with our explanation, that he still believed it did that, we'd be happy to work with him to clarify that language.

Ms. CHRISTIAN-GREEN. I'm sure you'd like to briefly reply, Mr. Perego.

Mr. PEREGOY. Thank you, Madam Chair.

First of all, let me just respond here, I don't think my friend the Deputy Solicitor here should be at all be perplexed about this testimony. We did have that meeting with them regarding the IIM appropriations rider. We did agree to that language.

However, the meeting that we had did not substantively get into discussions of this particular bill. And I informed Mr. Cohen on the phone afterwards that we have still got serious problems with it. Now, I'd like for the record to reflect that we have analyzed this legislation in conjunction with our expert, Price Waterhouse Coopers. There is no question in their mind, in their conservative view, if you will, that this bill as it's presently written is going to cost IIM account holders tens of millions of dollars.

It is complex, but quite frankly, I don't think Interior, in the best light, understands what they have done here. And I appreciate Mr. Cohen's public commitment here that he will work with us to get that straightened out. We have provided, in the last section of my testimony, recommendations to do that, to strip everything out of there, out of that bill, that relates to IIM accounts, and then put in prophylactic language that's going to protect the rights and interests of over one-half million Indians. We told them that last week, we got no commitment from them on that. But we look forward to working with them on that. Because this legislation as it affects the IIM account holders and the litigation has no business in the hallowed halls of Congress.

Ms. CHRISTIAN-GREEN. Thank you. We've been joined by our Vice Chairman, Senator Inouye. With your permission, I'd like to ask one more question.

Senator INOUE. Please do.

Ms. CHRISTIAN-GREEN. Thank you. Again for the administration, if the bill is enacted, the Department will be in negotiations with

potentially hundreds of tribes at one time. During this time, tribes are precluded from going to court during negotiations.

Thus, some or many tribes will be forced to wait years, maybe even a decade or more before their case is heard. At what point, 2, 3 years, do you think the tribes should have the right to proceed directly to court? Or should there be an opt-in or opt-out, at the beginning of the process?

Mr. GOVER. Representative Christian-Green, it would do exactly what you've described. We think that's useful, simply because it's quite common in any lawsuit against the United States, that one be required to exhaust administrative remedies. What we are proposing is an administrative remedy. Frankly, one that is quite propitious, given that we have so many accounts, and we would be proposing some prompt time frames for the resolution or non-resolution of these issues, at which point the tribes are free to take their claims forward to court.

Mr. SIMON. Madam Chair, if I may add to that.

It is very difficult to deal with the situation when records are missing. Arguments can be made sometimes on either side as to what the implications are of the missing records.

We have had experience in this country of dealing with claims like that under the Indian Claims Commission Act of 1946. That experience suggests that we ought to try to resolve these claims in a way short of litigation. Because the claims that were brought under that act took many, many years, decades to resolve. We're still, this is a very sad and unfortunate fact, we are still resolving the very last of those claims more than 50 years later. We are very hopeful to resolve them all.

But that is not a happy story. And we are very anxious to have a system that might resolve as many of these claims as possible, short of that kind of litigation.

Ms. CHRISTIAN-GREEN. I thank you for the answer. But I think we still are not clear whether you think there should be an opt-in or opt-out option at the very beginning of the process.

Mr. GOVER. Madam Chair, we're certainly willing to discuss the idea. It seems to us, though, that if a tribe wants to proceed in good faith, that asking it to participate in this process is not particularly burdensome. They have the right, at the end of the day, to say no. And for good reasons or bad, they have the right to say no.

Asking them to at least hear us out as to what we think our liability may be does not strike me as unreasonable.

Ms. CHRISTIAN-GREEN. Thank you, and thank you for the opportunity to chair.

Senator INOUE [assuming Chair]. Well, thank you for chairing the hearing. I would like to express my regrets and my apologies for not being here from the very outset.

Mr. Secretary, I am sorry I was not here to hear your testimony. But the old proposal covers a period from 1972-92, is that correct?

Mr. GOVER. That is correct. Potentially from 1972 to the present, at the option of the Department and the tribes.

Senator INOUE. Are you suggesting that pre-1972 claims be handled by litigation and not by negotiation or mediation?

Mr. GOVER. I don't think we're exactly suggesting that. What we are saying is, we are uncomfortable at the Department, because we have the best information on the period from 1972-92. However, we are uncomfortable wanting to bind either the Department or the tribes to a process to address claims before 1972.

That is not to say those claims do not exist. Although we do not concede that they do exist, either. We're saying this bill just simply doesn't address them. And if the tribes wish to litigate it, then that's their choice.

But it's just very difficult for us to engage in discussions of this type where we just don't have the kind of information that we'd like to have.

Senator INOUE. I have been advised, Mr. Secretary, that as of May 1997, 41 tribes have agreed with the trust fund account balance that was presented by your Department. The bulk of the tribes either disputed the balance, needed more time to respond, or did not respond. Is there any updated list indicating additional tribal responses?

Mr. GOVER. No; those are the most recent. That's the only time that we put those balances out for comment.

Mr. COHEN. Mr. Chairman, the statute that we did the reconciliation under, the 1994 statute, required us to do the best we could. And the reconciliation is what we came up with. And then ask the tribes whether they disputed the balance.

And the results that you described are what we got back, 41 disputed, I believe, 51 disputed, I'm sorry, 41 accepted the balance, 47 requested additional information and 171 didn't respond one way or the other.

Senator INOUE. And what do you propose to do with those who have not responded?

Mr. COHEN. What we propose in this legislation is to again go back and offer all the tribes, as I described earlier, a good faith settlement offer which they could accept or reject, give them the opportunity, should they choose to exercise it, to engage in government to government negotiations which are presided over by a mediator. It would be informal and non-binding.

Then in the event they did participate in the mediation but did not accept the result, they could then file a lawsuit.

Senator INOUE. The 41 who accepted would not have to go through this process?

Mr. COHEN. No; but we would offer a settlement offer to the 41 as well, which they could take or not take. If they accepted it, they presumably are happy with what we've done. Nonetheless, we felt that we ought not exclude them from this process, to give them an opportunity to reconsider their position in light of what we're offering other tribes.

Senator INOUE. Thank you very much.

If I may ask Chairman Fox a couple of questions. Even though H.R. 3782 does not deal with Federal malfeasance at all stages of trust management, if there are tribes that accept the account balances as presented by the Department, is it your position that they should have to wait to negotiate a settlement with the United States?

Mr. Fox. No, Mr. Senator; I don't think so. I think we could propose legislation where tribes that had no dispute would be able to expedite their claims or their settlement and move forward with finding out what those final balances are as expeditiously as possible.

Senator INOUE. So under their proposal they will not have to go through with further negotiations?

Mr. FOX. That's correct. There would be an option for that.

Senator INOUE. The ITMA, your organization, opposes this bill and has proposed its own bill. Do you feel that the best elements of both proposals can be combined in a way to reach consensus between the tribes and the Government of the United States?

Mr. FOX. Senator, I think if we keep the tribes involved and keep the tribes informed of what those best elements are of both bills, and we get out to Indian country and review it with them, I think we can come to some type of consensus, and very soon, on what we should have in a bill. And that can be obtained.

But I do know that most of the tribes are opposed to the bill that is proposed now by the Secretary.

Senator INOUE. So at this stage, you have not explored the possibility of reaching a consensus, have you?

Mr. FOX. Yes; we have, Senator. We have had regional meetings sponsored by ITMA where we have discussed, first of all, the Secretary's proposal, and we have also sent out the drafts of ITMA's proposed legislation for their review as well, and have had meetings and discussions. And there are issues that even among the tribes we are not yet gaining consensus on, but we're getting there.

Senator INOUE. What types of responses have you received from tribes on this first attempt?

Mr. FOX. I think on the first attempt, there were very, very few tribes that have attended the meetings. And we've had meetings where most of the time there are 30 or 40 tribes present. Most of the tribes automatically agreed that the current legislation is not good legislation. When we gave them information about what we could potentially put in a bill, I would say 80 percent of it they were in agreement with. But there was about 20 percent that tribes disagreed with and said there are better ways to put this forward to Congress. And I would characterize it that way.

Senator INOUE. Thank you very much.

If I may ask Governor Johnson a question. We have been advised that your management of your trust funds deserves some consideration by other tribes. Can you describe your current management framework of your trust funds?

Mr. JOHNSON. I would be glad to, Mr. Chairman. Several years ago, we entered into an agreement with the Bureau of Indian Affairs whereby the Pueblo of Laguna has hired its own financial advisor. It is this financial advisor who, working in conjunction with the Treasurer of the Pueblo, gives direction to the Office of Trust Funds management or guidance in terms of how our funds, which are currently held in trust, should be invested.

We've found that this is a process that has certainly served to help us to at least increase the rate of return and to ensure accountability for all of the funds that are being held in trust by the Department at this time.

Senator INOUE. Are you satisfied that the members of your Pueblo are pleased with the current management?

Mr. JOHNSON. Yes; I am. We're pleased with the rate of return and the accountability that comes with it.

Senator INOUE. Does your Pueblo support the ITMA alternative to this bill?

Mr. JOHNSON. We support ITMA's initiative to develop tribal-specific legislation. We have been party to discussions that have been held by the membership of ITMA and I would agree that we have agreement as to principles of the text of legislation. There are some minor areas of difference that we have yet to work out.

Senator INOUE. Are there other Pueblos who follow your scheme of management?

Mr. JOHNSON. As far as I know, we're the only tribe that has such an agreement with the Bureau.

Senator INOUE. I thank you very much, Mr. Governor.

Do you have any more questions?

Ms. CHRISTIAN-GREEN. No further questions.

Senator INOUE. Well, once again, my apologies for not being here at the opening of this hearing. I would like to thank all of you on behalf of both the House and the Senate committees.

Ms. CHRISTIAN-GREEN. I just want to make a few closing remarks, though, and I want to begin by commending the administration for coming up with what I think is a fair try at addressing this situation through the legislation. But clearly, the tribal witnesses do have problems with it. Mr. Fox has asked that our committees support discussion between the tribes and the Bureau of Indian Affairs to come up with a fair conclusion. And we need to make this happen.

So we're hopeful that everyone here today will pledge to work together to that end.

And to Attorney Peregoy, let me say that we will take your testimony under serious consideration. However, the legislation is intended to affect tribal accounts. We need to make it clear that the IIM accounts and your court case would not be affected by what we're discussing, and would be made law.

Mr. PEREGOY. Thank you, Madam Chair.

Ms. CHRISTIAN-GREEN. And finally, just to thank the witnesses and the discussion will continue, as we must make sure that the trust fund account problems are addressed with the utmost deliberation. Thank you very much.

And thank you again, Senator Inouye, Mr. Chairman, for the opportunity to chair this meeting.

Senator INOUE. I will be calling upon you for a briefing.

Ms. CHRISTIAN-GREEN. Surely.

Senator INOUE. I thank you very much, Madam Chair.

Gentlemen and lady, I am certain all of us are aware that this matter before us has been festering in Indian country for all too long. I am very hopeful that with the sentiments expressed by all of you, and with the knowledgeable background of our Assistant Secretary, that a consensus can be reached.

I have always felt that with every problem, there is a solution. I think this problem does have a solution. If the Laguna Pueblos can work it out, I don't see why other Pueblos and other tribes

can't do it. And I'm certain that the administration is sufficiently open-minded to sit down and change, if change is necessary.

So I look forward to the next gathering when we may be able to, as you pointed out, sir, Mr. Fox, say that we have a consensus. With that, I thank you all once again, and the hearing is adjourned.

[Whereupon, at 10:37 a.m., the committees were adjourned, to reconvene at the call of their respective Chairs.]

APPENDIX

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

PREPARED STATEMENT OF HON. BEN NIGHTHORSE CAMPBELL, U.S. SENATOR FROM COLORADO, CHAIRMAN, COMMITTEE ON INDIAN AFFAIRS

Good morning and welcome to the Committee on Indian Affairs' second hearing this session on the issue of Indian Trust Funds.

I first want to make clear to those unfamiliar with the Trust Funds issue that the money in these accounts (or that is supposed to be in these accounts) is Indian money that has been entrusted to the United States. It is not Federal money.

There are billions of dollars at stake here: The Department's reconciliation project was unable to reconcile some \$2.4 billion in tribal funds.

Today our witnesses will discuss H.R. 3782, a bill to resolve tribal trust fund accounts problems.

As you know, a class action lawsuit is pending that involves individual Indian money accounts not covered by this legislation.

Last July, this committee conducted a hearing on the "Strategic Plan" to improve trust management systems submitted by the special trustee for American Indians.

In August, the Secretary of the Interior began to implement badly-needed improvements in the way it handles and manages Indian Assets, Leases, and Trust Funds.

I firmly believe that any effort to provide tribes with accurate balances for their accounts must be built on a firm foundation of solid management and accounting systems.

The bill under consideration would provide a framework to arrive at settlement of the tribal accounts after decades of Federal mal-feasance and non-feasance regarding Indian Funds.

Ultimately, the United States will be liable for this mismanagement, the only question really is "How liable?"

Though there is much opposition to H.R. 3782, I believe that a framework providing options such as negotiation, mediation and litigation as a last resort, is the way this problem can be remedied in the shortest period at the least cost to all parties.

There are matters that must be addressed in order for any trust funds legislation to receive the support of this committee.

These include:

- Providing that the inability of the trustee to produce records and documentation does not relieve the Department of the full measure of liability for mismanagement;
- Assuring fair and complete methods to assess all damages suffered by the tribes;
- and

- Assuring that money paid in satisfaction of tribal claims be paid from the Judgment Fund, not from Indian Appropriations.

With that, I look forward to hearing from the panel we will hear from today which represents the United States, the Inter-Tribal Monitoring Association for Indian Trust Funds, and Indian tribal governments.

PREPARED STATEMENT OF HON. JOHN MCCAIN, U.S. SENATOR FROM ARIZONA

I want to thank Chairman Campbell and Chairman Young for holding this joint hearing today on S. 1770, a bill to establish the Director of the Indian Health Service as the "Assistant Secretary for Indian Health" within the Department of Health and Human Services. I want to thank Julia Davis and Buford Rolin for appearing today and re-affirming their support for this bill.

S. 1770 represents our third effort to designate the IHS Director as an Assistant Secretary. I believe that we are much closer to reaching an agreement with the administration on the scope of this bill and gaining their support to finally pass this legislation.

Our primary focus in forwarding this bill is to raise the overall standard of health conditions of the more than one million Indian people eligible for health care—not to add another bureaucratic layer in the Department or to debate the authority of one official over another. This bill responds to health crisis in Indian country and the continuing frustration on part of the more than 500 tribes in this country to truly have a serious policy position in the Department.

I want to make clear that while we are debating technicalities and word-smithing over this bill, thousands of Indian people are suffering from the worst imaginable health care conditions in this country—from diabetes to cancer and infant mortality. I find it unconscionable that we continue to tolerate the poor standard of living for Native Americans, which continues to fall far short than any other population in America.

There are three clear reasons to support this legislation:

Enactment of this bill will finally recognize the unique government-to-government relationship between federally recognized tribes and the primary health agency of the Federal Government. Health care is the highest priority among all Americans, including Native Americans. Indian tribes are not merely another racial or ethnic minority, they are distinct political governments and we are long overdue in recognizing this special relationship.

It is my expectation that the Assistant Secretary for Indian Health will provide the necessary leadership and consultation to the Secretary and other Assistant Secretaries on the important health matters facing Indian people.

Second, Indian people simply need a stronger voice and a seat at the table when important decisions are made about Indian health policy and budget determinations. Secretary Shalala and the Department have made great strides to improve health services to IHS and Indian people overall. While many of these changes are positive, the administrative process continues to bog down the Director and the Agency.

Year after year, we continue to see a downward trend and shortfalls in the IHS budget. The FY99 budget for the IHS includes less than a 1-percent increase for Indian health programs. An Assistant Secretary for Indian Health will not only provide a better advocacy role in the budget determination process, but can also help to leverage departmental budget increases, including other resources, in the future.

And, finally, the Indian Health Service is slowly moving toward Tribal Self-governance. Important changes are occurring in the Native American health care system. This bill helps to ensure that the policy of tribal self-determination will be the platform for existing and future policy of the Department.

I want to make one last point about this bill. I recognize that the administration still harbors concerns over a provision that would separate the IHS from the Public Health Service. I believe that this proposal deserves full consideration and input from the administration and the tribes—and we should make the best decision that will ultimately benefit the IHS and Indian communities. I am hoping that Indian country will agree that we should deliberate carefully on the independence of IHS separate from this bill. I am also asking that the administration commit to keep this dialog on-going and give this proposal serious consideration.

I am glad that the administration and the Congress have finally reached agreement on the priority of Indian health care and jointly recognize that this bill is one step toward ensuring that the standard of health care for Indian people will be raised to the highest levels possible within the Department. Thank you for appearing today.

STATEMENT OF GEORGE MILLER
JOINT HEARING ON
HR 3782 TRIBAL TRUST FUND SETTLEMENT ACT OF 1998

&
S. 1770 TO ELEVATE THE DIRECTOR OF INDIAN HEALTH SERVICE
HOUSE RESOURCES COMMITTEE
SENATE COMMITTEE ON INDIAN AFFAIRS
JULY 22, 1998

Mr. Chairman. This morning we will hear testimony on two matters of great import to Indian country. First, we will take testimony on HR 3782, the Tribal Trust Fund Settlement Act of 1998, which I introduced at the request of Secretary Babbitt. Many of us have worked on the problems with the mismanagement of Indian trust funds for over a decade now. We have always worked on these problems in a bipartisan and bicameral manner and I look forward to continuing in that vein as we deliberate additional actions.

The purpose of HR 3782 is to set up a process through which the Department of Interior and the Indian Tribes can negotiate a mutually desirable settlement of accounts held by the United States. If settlement can not be reached then tribes would retain their right to have the courts address the inadequacies of their trust fund account balances. Settlement reached by negotiation will be far less costly to all sides than protracted litigation. I believe this idea merits our serious consideration.

If we move forward with legislation setting up a settlement process, we must insure that it is fair and not slanted toward one party or the other. Several provisions in this bill should be looked at and carefully considered. I believe this bill represents a good faith effort on behalf of the Department of Interior and I commend them for their work.

I am aware that the Intertribal Monitoring Association on Trust Funds has drafted legislation which also addresses negotiations. I think we should consider that legislation as well. We need to hear from all the experts before moving forward on any legislation in this area. I have drafted a letter to the General Accounting Office asking them to react to both bills, as it was GAO which first suggested settlement legislation to the Committees in September of 1995.

I look forward to beginning the process of looking into effective settlement legislation beginning with our witnesses today.

Further, Mr. Chairman, I am pleased to offer my strong support for this legislation which, as we have heard, will elevate the status of the Director of the Indian Health Service to the rank of Assistant Secretary. This legislation is significant because it will give the IHS a greater role and say among the various agencies in the Department of Health and Human Services. The IHS will have a new office in the Department under the Assistant Secretary for Indian Health. Promoting the Director to Assistant Secretary will involve him in more high level meetings, will give the IHS a greater say in the budgetary process, and eventually result in greater services and attention to Native Americans by strengthening the government-to-government relationship. In other words, this is not merely a symbolic gesture. This bill demonstrates that Indian health care is just as important as other people

in this country. Moreover, such a status change also demonstrates that Congress and the Administration are taking seriously the longstanding federal policy of Indian Self-Determination and Tribal Self-Governance.

I understand that the Administration supports this bill in principle, although there are concerns about the role that the Public Health Service will continue to play in Indian health. I also understand that the Indian and Alaska Native tribes all support this bill. I am confident that the House and Senate committees will continue to work with the Tribes and the Administration in crafting a bill that addresses tribal health needs and the Administration's concerns.



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

TESTIMONY OF

KEVIN L. THURM
DEPUTY SECRETARY OF HEALTH AND HUMAN SERVICES

BEFORE THE
SENATE COMMITTEE ON INDIAN AFFAIRS
AND
HOUSE COMMITTEE ON RESOURCES

REGARDING S. 1770, THE ASSISTANT SECRETARY FOR INDIAN HEALTH ACT

JULY 22, 1998

Statement of Kevin Gover, Assistant Secretary-Indian Affairs,
U.S. Department of the Interior
on H.R. 3782, Tribal Trust Fund Settlement Act of 1998,
Before the Senate Committee on Indian Affairs and the
House Committee on Resources

July 22, 1998

Good morning, Chairman Campbell, Chairman Young and members of the Committees. I am pleased to present the views of the Department of the Interior (Department) on H.R. 3782, a bill to compensate certain Indian tribes for known errors in their tribal trust fund accounts, to establish a process for settling other disputes regarding tribal trust fund accounts, and for other purposes.

For nearly 70 years, Congress, the General Accounting Office, Tribes and Tribal organizations, as well as the Department, have identified deficiencies in the federal government's management of trust funds and the underlying trust assets. There have been sporadic efforts over the years to improve the automated systems, but until now, there has never been the resource commitment necessary to keep pace with the task.

Secretary Babbitt and the Clinton Administration have pledged that with Congress' support, these automated systems will be fixed. The momentum for doing this was initiated by the enactment of the American Indian Trust Fund Management Reform Act of 1994 (the "1994 Act"). Congress, for the first time, more specifically delineated the federal government's trust fund management obligations and put in place a framework for reforming the accounting and management systems, within the Act.

The Department's Trust Fund Initiatives

There are three components to the Administration's trust funds initiative. First, in conjunction with the Special Trustee for American Indians, we have developed recommendations for improving the underlying trust management and accounting systems, and are in the process of implementing those improvements. This initiative, known as the Trust Funds Management Improvements Project (Project), involves 13 separate tasks and includes data cleanup, new trust asset and accounting systems, and coordinated efforts to address appraisals, probate, and record management systems. The effort, already underway, has been planned to move us quickly to complete these improvements.

Second, we have developed legislation to address one of the root causes of our trust asset management difficulties -- the increasing fractionation of ownership of Indian allotted lands. As land passes from one generation to the next and the number of owners of each parcel increases, the Department's ability to keep track of each owner and properly account for each owner's interest becomes more difficult and more expensive. Moreover, this fractionation of interests

undermines the economic vitality of allottee-owned land because potential lessees do not want to deal with scores or even hundreds of owners on an individual parcel of land. We appreciate Chairman Young's sponsorship of the Administration's proposal to address the fractionation issue -- H.R. 2743 -- and we urge Congress to address the issue at its earliest opportunity. The third component of the Administration's trust funds initiative is embodied in H.R. 3782. That legislation is designed to put in place a process to address claims that Tribes may have with regard to the Department's past management of Tribal trust fund accounts. I would like to take a few moments this morning to describe the proposal and explain why we believe it represents a balanced approach for addressing Tribal claims.

The Reconciliation Project

The 1994 Act directs the Secretary to reconcile the balances of the tribal trust fund accounts and provide your Committees with a description of how the Secretary proposes to resolve any disputes with Tribes about those balances. The Department initiated the reconciliation process even before passage of the 1994 Act: in 1990, the Department awarded a contract to Arthur Andersen LLP, to undertake the Tribal Trust Fund Reconciliation Project under the supervision of the Department. The Project's basic reconciliation procedures encompassed the reconstruction of \$17.7 billion in non-investment transactions, of which \$15.3 billion -- about 86 percent -- were reconciled. For the reconciled transactions, approximately \$1.87 million in transactions were found to be in error -- an error rate of .01 percent. The remaining 14 percent of the transactions (\$2.4 billion) were deemed to be "unreconciled," meaning that the Department could not locate all source documents required under the Reconciliation Project procedures to verify the accuracy of the general ledger entry for the transactions within the time frame allotted to the reconciliation process. After Arthur Andersen completed its work, the Department continued its efforts to reconcile tribal accounts through the services of another independent accounting firm, which employed the same reconciliation procedures used by Arthur Andersen. These further efforts reduced the value of unreconciled transactions to about \$1.97 billion. This does not mean that the \$1.97 billion is lost or missing. It does indicate, however, that the poor condition of the records and systems did not allow the Federal government to conduct a complete audit or provide the level of assurance to account holders that was expected.

Because of the complexities of the reconciliation, the Department believes that the best way to resolve disputes regarding Tribal trust account balances is through legislation. H.R. 3782 contains the process that we believe best meets the interests of the Tribes and the federal government. Our proposal is the product of two rounds of consultations with Tribes, including eight public meetings around the country and the opportunity to file written comments. While we recognize that there are a number of different ways to address these issues, I will describe our proposal and why we believe that it would serve the interests of most Tribes that may want to assert claims against the government.

The Legislative Proposal

The legislation that we propose seeks to settle claims relating to the Department's management of Tribal trust funds for at least the period July 1, 1972 through September 30, 1992, and at the Tribes' option, for the period after 1992 through the date of settlement. The hallmark of our proposal is its focus on a Tribe-by-Tribe, government-to-government settlement process which would take into account the specific circumstances and claims of each Tribe.

Each tribe has been provided with a report describing the results of the Department's Reconciliation efforts. Under our settlement proposal, the government would identify all errors that we found in the Reconciliation Project ("known errors"), and we would credit the Tribes' accounts where money was found to be owed, on a net basis, with compound interest, as soon as possible. Because the government, as trustee, is obligated to correct its errors, these payments would be made notwithstanding a Tribe's willingness to settle its other claims.

The proposal then recommends a two-stage settlement process for resolving accounting claims other than those relating to known errors. First, the government would offer each Tribe the opportunity to settle claims immediately for a specific sum based on a formula that would take into account the particular characteristics of the Tribe's accounts. If the Tribe accepts the offer, claims would be settled by payment according to the formula, and the matter would be closed. If the Tribe does not accept the offer, it would be withdrawn and stage one would be concluded.

In stage two, Tribes would have the opportunity to engage in government-to-government, non-binding settlement negotiations with a mediator. As part of the negotiations, there would be an opportunity to obtain additional data or undertake additional analysis to the extent it would be constructive in reaching a satisfactory resolution of claims. If the mediation process is successful, Tribes would be paid according to the terms of the settlement. If not, a Tribe would be authorized to file a claim in the United States Court of Federal Claims within the parameters defined by Congress in the legislation.

Our proposal puts in place a process for settling claims; it does not impose a settlement on anyone. Tribes that are satisfied with their settlements can accept them. Those that are not can litigate.

We place a great deal of emphasis on informal dispute resolution without taking away the right to litigate claims in court if those efforts are not successful. We would pay known errors immediately and also place on the table a settlement offer which Tribes would be free to accept or reject. Our goal is to pay legitimate claims to Tribes as quickly as possible without incurring the high transaction costs that are often associated with litigation. Tribes which believe the settlement offer fairly resolves its claims will take it. Those who do not would be free to reject it and move on to the next stage of informal, non-binding mediation.

This is particularly important for the vast majority of Tribes that have a relatively small amount of money at issue. There are roughly 114 Tribes that account for 98% of the unreconciled transactions. We believe that the bulk of the 196 remaining Tribes, with only 2% of the unreconciled transactions, will be more interested in obtaining redress quickly and informally -- either by taking our initial settlement offer or a settlement offer developed in mediation -- without incurring large attorney and accounting fees. Our approach will allow that to happen.

For Tribes who are dissatisfied with the Department's offer, they will have their day in court. However, the Department will have every incentive to place a favorable settlement offer on the table. If settlement can be reached, both the Tribe and the government would be spared the distraction and cost of extensive litigation.

This settlement proposal also focuses on those areas where we have the greatest likelihood of achieving a settlement because we already know as much about the state of the accounts as we are likely to know. Our proposal focuses on the period of the Reconciliation Project -- July 1, 1972 through September 30, 1992 -- and up to the date of settlement if a Tribe desires to settle through that date. We already have spent \$21 million learning what we can about the state of the accounts for that period. Using that analysis as our base, we expect to reach settlements quickly and fairly.

Other proposals that we have seen purport to settle claims going back hundreds of years and include not only claims relating to accounting and management of trust money, but those relating to management of the underlying assets as well. While we have serious doubts about the government's potential liability going back that far, H.R. 3782 does not seek to resolve this issue. This legislation would not extinguish any claims other Tribes may believe they have for the pre-1972 period, nor would it diminish the Tribes' ability to bring lawsuits on such claims.

The same is true with respect to asset management claims. Other than occasional anecdotal statements, we have absolutely no data suggesting that Tribal assets were systematically mismanaged and have no reason to believe that they were. Moreover, given the large number of variables involved in evaluating such claims -- including the type of asset, the period of time, the length of a contract or lease, the geographic region and the state of the market at the time, just to name a few -- these types of claims do not appear to lend themselves to resolution by any means other than individual adjudication. For these reasons, our legislative proposal would not extinguish such claims.

What we are trying to avoid is a repeat of the Indian Claims Commission process, which was intended to be a relatively fast, informal and inexpensive means of resolving Tribal claims. It turned out not to be fast -- the last few claims are now being resolved, 50 years later. Nor was it informal and inexpensive. Trying to solve all claims of every nature with no parameters was an approach that was tried before that didn't work. Our proposal tries to avoid past mistakes.

I also want to clarify that this legislation does not affect any Tribal trust fund litigation filed in court on or before November 12, 1997. Nor is it intended to settle or solve potential IIM claims, or to limit the government's potential liability with regard to any such claims, which are currently the subject of a class action lawsuit entitled *Elouise Pepion Cobell et al. V. Bruce Babbitt et al.* We understand concerns have been expressed by the Indian community regarding Sections 15 and 16 of H.R. 3782. Both our December 1996 and November 1997 reports to Congress recommended the inclusion of these provisions.

Section 15 is largely aimed at correcting the overall books of the Government, to ensure that the balances in U.S. Treasury Accounts equal the underlying positive balances in both individual and tribal trust fund accounts. The Department's and the Treasury's books are not in agreement as a result of historic inadequacies in systems, policies, practices, and procedures. Correction of these book differences is an integral part of our trust reform efforts. For the most part, we expect these provisions to result in aggregate account level adjustments. Potentially, they could result in some adjustments to an underlying account. However, we do not expect such adjustments to be significant. Section 16 provides a mechanism to address routine administrative errors prospectively.

I believe that H.R. 3782 will provide a process to address claims relating to the past management of Tribal trust funds. This concludes my statement. I will be happy to answer any questions you may have.

TESTIMONY OF THE HONORABLE ROLAND JOHNSON, GOVERNOR
THE PUEBLO OF LAGUNA, IN OPPOSITION TO H.R. 3782

Submitted to the House Committee on Resources and
The Senate Committee on Indian Affairs

July 22, 1998

Mr. Chairman, members of the Committee, my name is Roland Johnson. I am the Governor of the Pueblo of Laguna, a federally recognized Indian Tribe located in New Mexico, approximately 40 miles west of Albuquerque. On behalf of the Pueblo and its members, please accept our gratitude for the opportunity to address this Committee regarding our views of H.R. 3782, the trust fund resolution bill.

We are vigorously opposed to this bill for reasons that I will elaborate on. In summary though, the bill is deceptive and intended to bring bureaucratic or administrative closure to longstanding and ongoing government mismanagement of tribal trust property. The bill would create a process that by its very design would prohibit tribes from ever getting an accurate accounting of the government's trust property mismanagement. Essentially, a process would be created and put in place that will facilitate a permanent cover-up. We oppose that approach in the strongest possible way. It is our belief that we are entitled to equal justice on a level of equality that the Congress provided to all Savings & Loan account holders: Nothing less and nothing more. Our history and our historic relationship to the United States requires this.

The Pueblo of Laguna and its people occupy the same land that our ancestors have occupied for centuries, long before the first Europeans set foot on this continent. Those chosen for leadership have always served in such positions as a matter of honor and sacred trust. The leadership of the Pueblo has always been accountable to the people of the Pueblo for the proper care and custody of our lands and common property. This accountability is complete. Nothing less is expected or accepted. We view the obligations of the United States in the context of its self-imposed trust duties to be of the same degree of completeness and integrity. And yet that is not what we have seen from the Department of Interior with regard to its administration of trust property and in its refusal to fully account to the tribal beneficiaries.

As the contractor to the Department (Arthur Andersen, LLP) noted in its so-called reconciliation report it provided to tribes, the balances posited for each tribe were not intended to be relied on. The process used was not an audit conducted pursuant to generally accepted auditing standards. In fact, the scope of the engagement of Andersen was limited to at best to an "attempt" to reconstruct certain historical transactions, to the extent practicable, for certain years with regard solely to trust funds managed by the Bureau of Indian Affairs. Andersen did not have as an objective reconciliation of balances of tribal trust funds. Accordingly, Andersen expressly refused to state an opinion on the accuracy of any of its so-called findings. When the results of these accounting exercises was complete and presented to the tribes, what did the BIA then demand of each tribe? Indeed, what does H.R. 3782 demand of each tribe?

By design, according to the scheme disclosed to the tribes in a meeting in the Assistant Secretary of Interior's conference room with the then Controller of the United States, Ed Mazur, several years ago, the tribes were to be given numbers for trust fund balances which each tribe was then obliged either to agree or disagree with and, if a tribe was in disagreement, to prove otherwise.

To prove otherwise a tribe must get access to all records that pertain to its trust funds wherever such records may be. And yet the Bureau refuses to give open access to all such records. A tribe that remained in disagreement would then be obliged to sue the government in the United States Court of Federal Claims. That Court has been widely criticized in scholarly law review articles for the manner in which it has treated valid Indian claims. This proposed legislation would legitimize this unconscionable scheme and worse. H.R. 3782 goes much further.

Inserted in the definitions sections of H.R. 3782 under "covered claims" and "deficiencies in the management and accounting of tribal trust funds" is language that would sweep within the coverage of this bill "all errors in the management and accounting of tribal trust funds from the point of their collection through disbursement, including, but not limited to, collection of the appropriate amounts under lease, permit or sale agreements or other contracts, proper recording of transactions, timely collection of revenues, proper accrual of interest, adequate yield on investments, undocumented roll forward amounts, delays in the accrual of interest and proper disbursements." This language has been placed there by design, carefully constructed, for the purpose of forever defeating valid tribal claims and covering-up the Bureau's mismanagement.

It is our understanding that a private trustee has a legal duty to disclose fully all mismanagement that such a trustee may have committed. The Bureau should be held to no less a standard. This bill is so outrageous in the fraud it seeks to perpetrate that this Committee is respectfully requested to investigate the drafting of this bill and its presentation to this Congress. To its credit, Congress did not permit such a response to the Savings & Loan account holders where the government had secondary liability as a guarantor. Congress should not permit such proposed action as H.R. 3782 includes here where the government's liability is primary due to its own defalcations. Those who have drafted this bill should be required to be accountable for this indecent proposal.

The Pueblo of Laguna has its own investment program which it controls and which it is accountable for. We have produced a better rate of return than the Department of Interior ever has. We have complete and accurate accounting, and we have control that is exercised in a prudent and honest fashion. If we were ever to suggest a scheme to avoid accurate accounting such as this Congress is being asked to consider in H.R. 3782, we would likely be investigated by the office of the United States Attorney in Albuquerque. Of course, we would never, ever, even contemplate such a dishonorable scheme. On behalf of the Pueblo of Laguna and its members, I respectfully ask that you not permit the Department of Interior to do this to us.

It is my understanding that this Committee's hearing record will be kept open for a brief period after today. The Pueblo of Laguna would like to be able to submit additional, more detailed comments on H.R. 3782 as the brief time allotted today for oral

testimony is simply not adequate to cover all of the matters that the Committee should be aware of.

Once again thank you for the opportunity to appear before this Committee and present our views.

INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds

TESTIMONY

before the

**THE SENATE COMMITTEE ON INDIAN AFFAIRS
AND
THE HOUSE COMMITTEE ON RESOURCES**

JULY 22, 1998

Submitted by
**INTERTRIBAL MONITORING ASSOCIATION on Indian Trust Funds
(ITMA)**

Mr. Chairman and members of the Committees, I am Mark N. Fox, a member of the Three Affiliated Tribes of North Dakota. I am the Chairman of the Intertribal Monitoring Association on Indian Trust Funds (ITMA). The Association was founded in 1991 to advocate for increased tribal control over our trust funds, for reform of the Interior Department's systems for managing Indian trust funds, and for fair compensation to the tribes for the money they lost as a result of the Interior Department's mismanagement of our money and resources. ITMA represents tribes who own the majority of trust dollars managed by the United States.

The tribal Nations who are members of ITMA include, Central Council of Tlingit & Haida Indian Tribes, Kenaizte Indian Tribe, Hopi Tribe, Tohono O'odham Nation, Salt River Pima-Maricopa Indian Community, Hoopa Valley Tribe, Yurok Tribe, Southern Ute Tribe, Passamaquoddy-Pleasant Point Reservation, Penobscot Nation, Sault Ste. Marie Tribe of Chippewa, Grand Portage Tribe, Red Lake Tribe of Chippewa Indians, Blackfeet Tribe, Chippewa Cree of Rocky Boy, Confederated Salish & Kootenai Tribe, Crow Tribe, Fort Peck Tribes, Fort Belknap Tribes, Northern Cheyenne Tribe, Winnebago Tribe, Walker River Paiute Tribe, Pueblo of Cochiti, Jicarilla Apache Tribe, Pueblo of Laguna, Mescalero Apache Tribe, Pueblo of Sandia, Turtle Mountain Band of Chippewa, Three Affiliated Tribes, Kiowa Tribe, Muscogee Creek Nation, Cheyenne River Sioux Tribe, Sisseton-Wahpeton Sioux Tribe, Chehalis Tribe, Forest County Potawatomi Indian Community, Oneida Tribe, Shoshone Tribe, Arapahoe Tribe and the Osage Tribe. The Association is appreciative of this opportunity to testify on the critical issue of resolving the United States' liability for its nearly 200 years of gross mismanagement of Indian trust funds, trust land and trust assets.

The Intertribal Monitoring Association on Indian Trust Funds is on record officially rejecting Interior's legislative proposal and urges the Department to meet further with Tribes to formulate legislation that will fairly and fully compensate Tribes for damages suffered as a result of the United States' gross breach of trust by applying standard trust law principles. With thirty-nine tribes present at a June 5, 1998 meeting, the position was reiterated and the attached resolution was unanimously adopted. The Council of Energy Resource Tribes representing forty-five federally recognized Indian Tribes and four affiliate members of Canadian Nations a majority of which are major trust fund account holders, have passed a similar Resolution as did the National Congress of American Indians, the largest national organization comprised of representatives of and advocates for, national, regional, and local tribal issues. The tribes of Chippewa Cree, Yurok, Oneida, Fort Belknap Community Council and the Passamaquoddy Indian Township have further reiterated opposition by tribal resolutions and letters. All resolutions are attached for the record.

ITMA member tribes would like to express our appreciation to the two Committees for the great leadership role they have played in helping progress to occur as a result of the 1994 Trust Fund Management Reform Act provided tribes with the

authority to remove their trust funds from Federal trust status. The Special Trustee's Strategic Plan has provided a blueprint for reforming the Department's management of our trust funds and resources and we are impressed with the steps the Special Trustee has already taken, with funds and support from Congress, to put in place the building blocks of a legitimate Indian trust fund management system. We were glad to hear Assistant Secretary Gover set out his commitment to reforming the BIA's management of the trust assets, though we are still concerned about whether the BIA has an adequate administrative structure in place to implement the reforms, as this is a long standing, systemic problem.

Now the subject of this hearing -- compensating tribes for the losses they suffered as a result of the Federal government's continuing mismanagement of our trust lands, resources and funds. ITMA has developed draft proposed legislation. A copy of is provided herein. ITMA emphasizes that settlement is a complex issue and Indian country is still examining and discussing this draft. As a result, our draft is a work-in-progress, with nothing set in stone. We ask that the Committee substitute the ITMA draft for the Department's bill, so it can be the subject of further discussion and debate, and that any Congressional action be postponed until next year. During this period, ITMA will be working with the tribes throughout the country to revise and polish the bill so we can come back early next year with a bill that has the consensus of Indian country.

About two hundred years ago, the Federal government began coming to the tribes and telling them, "we have bad news and good news." The bad news is that we are taking most of your land and placing you on tiny reservations that cannot really support your people. The good news is that the Federal government will be managing that land and the income earned from that land in trust for you, which imposes upon us the highest fiduciary obligations. "Now in 1998, the Interior Department has followed in these footsteps once again coming to us and telling us it has bad news and good news. "The bad news is that the Federal Government has grossly mismanaged its high fiduciary duty. As a result, you have lost untold amounts of income that you should have earned from your trust land and money. The good news is that we have sent to Congress a proposal to compensate you for these losses." I do not think the Indian people can stand anymore "good news" from the Federal government.

A detailed analysis of what is wrong with the Department's bill is outlined in an attachment. A few of the unacceptable provisions are as follows: Section 4(a)(4) provides that if a tribe settles under the terms of the bill, it will extinguish all of the tribe's claims for losses it suffered as a result of BIA mismanagement, beginning with whether the amount of income provided for in the lease was properly collected, and then going through all of the subsequent stages -- timely deposit of the income, appropriate investment, proper disbursement, etc. Yet, in Section 9(c), if a tribe goes to court, the bill would limit the court, when determining how much the tribe lost, to analysis of just the "Reconciliation Record", which addresses only one small part of that process -- whether the BIA properly entered deposit and disbursement transactions in

the general ledger. As a result, the bill effectively imposes a ban on any analysis to determine how much the tribes lost in all of the other stages. The court will then be unable to award damages to the tribes for these other stages unless the tribe can provide records that show how much it lost. Since it was the Interior Department's responsibility to maintain the records, but has failed to do so, it will be the rare tribe that can produce its own documentation. Thus, this ban on analysis will enable the Department to avoid having to pay compensation for the vast majority of the losses tribes suffered.

For example, this limitation on analysis prevents the court from addressing one of the biggest holes in the trust system -- the losses tribes suffered because the BIA never installed an accounts receivable system and thus has no way of knowing if it collected all of the money due on a lease. Since 50% of the lease documents have been destroyed, it will be impossible to recreate an accounts receivable system. The only way tribes could demonstrate their losses is through the use of the very kind of analysis the Department's bill prohibits. Thus, the tribes surrender all of their claims but can get compensated for just the one small area of loss for which the bill permits analysis.

The Department's bill is full of provisions like this one all designed to bias the outcome in the Department's favor, or which give the Secretary the upper hand at every stage. For example, under trust law, when a trustee has mismanaged his responsibilities so badly that there are insufficient records to produce an acceptable trust accounting, as is the case here, the courts have established a procedure that gives all of the benefits to the beneficiary and puts all of the burden on the trustee. Requiring anything more rigorous would be unfair to the beneficiary because it was the trustee's obligation to maintain the records and he should not be able to benefit from his failure to do so. The Department's bill turns these principles on their head, putting the Department in the driver's seat and imposing the burdens on the beneficiary.

The Department also claims that its legislation is designed for tribes that have uncomplicated trust fund histories and want an expedited settlement approach. They go on to say that the Department realizes the tribes with more complex trust fund histories will likely sue and that the legislation has no implications for those tribes. We believe this is inaccurate. The Department's bill provides that any tribe that wants to litigate must do so pursuant to the provision of that bill. The bill then goes on to unfairly stack the litigation deck in the Department's favor by taking away from tribes a number of rights they presently have in litigation against the Department. Specifically:

- ♦ The Department's bill lets the Department meet its obligation to provide a full trust accounting simply by submitting the reconciliation record, even though that record covers only a small portion of the areas for which the Department is obligated to provide a trust accounting;

- ♦ The Department's bill says that the only statistical analysis the court can rely on is analysis of the reconciliation record, which, as indicated, constitutes only a small portion of the areas that require analysis;
- ♦ The Department's bill limits the court to imposing simple interest on amounts owed by the United States, when courts presently impose compound interest in Federal breach of trust fund cases;
- ♦ The Department's bill would prohibit the court from considering congressional legislation tolling the statute of limitations on trust fund claims when the court decides statute of limitations interest. This provision is an attempt to use the legislation to overturn a Court of Federal Claims decision the Department lost, which holds that based on that congressional language, the statute of limitations does not begin until the Department has provided the tribes with a full trust accounting.

In sum, the Department's comforting words that its bill is benign for tribes that want to sue are as misleading as most of its other actions in regard to the trust fund issue over the years. In fact, its bill would strip the tribes of many of the rights they now have when litigating trust fund cases against the Government, while giving nothing back in return. It is simply an effort by the Department to use the legislation to change many of the rules applicable to trust fund litigation in order to give the Department an unfair advantage, while telling the tribes just the opposite.

We believe that there should be settlement legislation. However, the Department's bill is so flawed and unfair that it cannot serve even as a starting point for such legislation. We therefore request that Congress discard the Department's bill and begin working from the principles and draft legislation ITMA has prepared and which is still being reviewed by our member tribes. I will discuss the matters we want to see addressed in any final legislation during the remainder of my testimony.

The Department has asserted that settlement legislation is primarily for the benefit of the tribes, such that they must be prepared to accept lesser compensation through settlement than they could receive through litigation. To the contrary, it is the Executive Branch that is the primary beneficiary of settlement legislation because its alternative is to be forced to litigate 200 separate complex lawsuits against 200 different tribes and to have to admit to the court in each case that it so grossly breached its trust responsibility that it cannot even produce the records needed to determine damages. In fact, settlement legislation benefits both sides by reducing the time and cost involved in resolving the Government's breach of trust. Tribes will strongly oppose any effort to use settlement legislation as an excuse to reduce the Government's liability.

The Department has also tried another tack in its efforts to escape the full consequences of its mismanagement. It has tried to leave the impression that because the Department has made such a mess of the records and trust management systems, any effort to fully determine the amount of loss tribes suffered would be so expensive that Congress has no choice but to enact a superficial process that will largely permit

the Government to escape most of the financial consequences of its gross mismanagement. However, the courts refuse to let a trustee benefit from his mismanagement. Congress must do nothing less.

The courts have been able to maintain this principle by developing a well-established set of procedures for use when a trustee has not only breached its trust obligation, but has also destroyed or failed to develop the necessary records and systems, so that it is impossible to determine through regular accounting procedures how much the beneficiary lost as a result of the breach of trust. These procedures provide that the beneficiary is permitted to develop a methodology for obtaining a fair and reasonable estimate of how much was lost. Requiring anything more rigorous would be unfair to the beneficiary because it was the trustee's obligation to maintain the records and he should not be able to benefit from his failure to do so. The burden is then on the trustee to disprove the estimate, but all benefits of the doubt are resolved against the trustee. This is the standard that the courts likely would apply in tribal lawsuits against the United States for breach of trust if settlement legislation is not enacted.

Estimating the tribes' losses through alternative damage assessment methodologies can be done relatively inexpensively and quickly. It does not use the Arthur Andersen Reconciliation Report approach of trying to find and review millions of pages of documents, which is labor intensive but of little value when so many records are missing or were never developed. Instead, it involves substituting brainpower for extensive manpower by using forensic accounting approaches such as comparative analysis. It is no different from what the IRS does regularly when it needs to determine the taxes due from a taxpayer who has destroyed or never kept any financial records. IRS develops such estimates quickly and at far less cost than the Arthur Andersen approach. It simply uses forensic accounting techniques to develop the best estimate it can in a fixed period of time. The court will then give it the benefit of the doubt, knowing that it was the taxpayer's fault that this problem exists, just as in the case of Indian trust funds, it is the Federal Government's fault. Thus, what needs to be done is not rocket science but something that is done in the legal-accounting world every day.

Let me provide an example of how a damage assessment methodology might work. We know the Interior Department has mismanaged the tribes timber resources (see the Mitchell case) and has inadequate systems to insure the timber companies are reporting the correct amount of timber they are taking off the reservation or are paying the correct price. Because no adequate trust resource accounting systems were put in place by the BIA, it is now impossible to use existing documentation to determine how much a tribe lost as a result of the Federal Government's breach of trust in regard to timber. Instead, a process of estimation would be used.

One somewhat simplistic example of how this could be done would be to identify ten tracts of tribal timberland on different reservations throughout the country and then,

for each tract, find a comparable tract off the reservation that was properly managed and for which adequate records exist. The amount of income that was earned of the comparable tract would be compared to the amount of income the BIA records show were actually collected from the reservation tract managed in trust. Let us say that after examining the difference in income on all ten tracts, it is found that on the average, the BIA produced 6% less income than was earned from the off-reservation tracts. Then 6% would be held to be the universal percentage of income tribes lost from the BIA's mismanagement of their timber resources, (since a trustee is obligated to produce the highest yield possible). Thus, each timber tribe would be awarded, as damages for the timber mismanagement component of the trust process, an amount equal to 6% of the total timber income the BIA has collected for that tribe over the years.

Is this method precise and absolute -- no. Are there variations and local circumstances that would produce a higher or lower percentage on a particular tract -- yes. If a tribe or the Federal Government wanted to take the time and incur the expense involved in examining a particular tract in detail, it can do so. But assuming the parties want to avoid such costs and time, this type of approach provides a fast, inexpensive rough justice methodology that is similar to what the IRS or others do when a party that is liable has lost or destroyed all of the records needed to do a normal accounting. Experts would have to develop valid damage assessment methodologies phase of the trust management process -- oil and gas, hard rock minerals, investments, etc. As discussed below, ITMA's draft legislation establishes a mechanism for the development of appropriate estimation methodologies on a universal basis, so that each tribe and each court does not have to do it independently in 200 separate lawsuits.

With this kind of damage assessment technique as the core component to provide a fast and cost effective way to determine the amount of the Government's liability, fair and reasonable legislation will consist of the following elements:

1. Optional approaches. It would offer tribes several optional approaches for resolving their trust claims, in recognition of the fact that each tribe's trust situation is different. For example, some tribes had only small amounts of money go through the trust process and have uncomplicated claims. It would not be useful to make them go through a complicated procedure. On the other hand, some tribes' trust situation is so complicated that it would be impossible to settle it through any means short of complex damage assessment methodologies. It would be a waste of time and money to make such tribes go through the motions of a negotiation process before they can get to the damage estimate stage. Thus, using IRS terminology, there needs to be a short form and a long form.

(The Department's bill would lock all tribes into a single convoluted and biased procedure.)

2. Comprehensive. It needs to be comprehensive in that it must provide compensation for all of the areas of trust management in which the Department has breached its legal trust responsibilities to the tribes; beginning with the Government's obligation to properly manage the land or asset and taking it all the way through to the investment and disbursement of the funds. It would not make sense to enact settlement legislation if, at the end, there were a whole set of claims still to be litigated. While being comprehensive will make the process more complex, it will ensure that at the end, this entire 180 year trust mismanagement mess is history.

(The Department's bill would extinguish all claims beginning with the point in the system at which income should have been collected, leaving open all claims for the failure to properly manage and lease the trust assets. Also, as discussed above, the bill would make it impossible for the court to effectively analyze most of the areas of the trust process.)

3. Coverage. It will cover all of the years the Government has been mismanaging tribal trust funds, not just the 1972-1998 period covered by the Secretary's proposal. Otherwise it will still be necessary for 200 tribes to file lawsuits to obtain compensation for the pre-1972 period.

4. Trust law principles. It will follow trust law principles, particularly the principle that when a trustee is unable to provide a trust accounting, the approach is to produce an estimate of his loss based on sound damage assessment methodologies, with the burden on the trustee to disprove the estimate but with all doubts resolved against the trustee. For purposes of the Indian trust situation, this requires the development of sophisticated methods of analysis that can produce valid estimates of what was lost at each stage of the trust management process, particularly, in such complex economic sectors as oil and gas or timber.

(The Department's bill imposes such severe restraints on the kind of analysis that can be conducted that it would prevent any adequate estimate of the losses tribes actually suffered. It also stands trust law principles on their head by letting the Secretary prepare the estimate and imposing the burden on the tribes to rebut the Secretary's estimate.)

5. Fixed time and costs. It is preferred that the legislation contain specific time frames and cost limitations so it will not go on for 50 years, as have the Indian Claims Commission cases. The costs for attorneys and expert witnesses for both sides would be fixed through a budget and then paid, on an as-incurred basis, with Federal dollars. This issue is under continued discussion by tribes.

(The Secretary's bill imposes no limitations on the time and costs of litigation, while requiring the tribes to pay for their attorneys and experts. It also imposes

improper limitations on tribes' ability to access to the Equal Access to Justice Act for attorneys fees.)

6. Special forum. It will take place in a special forum established for the purpose of this issue, so that it will not clutter the courts and so that one set of judges can develop the necessary expertise in this area of the law, and develop a set damage assessment methodologies that may be used by more than one tribe. Congress has frequently created temporary courts to handle large numbers of lawsuits that have a common issue, e.g.: the temporary court established to hear appeals of windfall profits cases during the oil crisis. The issue of the process for selection of the special forum is under continued discussion by tribes.

(The Secretary's bill requires the first stages of the process to be controlled by the Secretary and gives him powers that will enable him to bias the process in his own favor. After that, the litigation is funneled into the regular Court of Federal Claims.)

7. Direction. The individual must be independent of the Secretary's control and must have adequate authority to maintain control of the process, such as in the form of a Special Master as is done in most complex litigation. The position needs to have complete access to all Government records and files. This issue is under continued discussion by tribes.

(The Secretary's bill puts no one in charge, except the Secretary, who is hardly a neutral party.)

8. Non-appropriated source of funds to pay damages. The funds to compensate the tribes will come from a source that does not cause existing federal funding to Indian programs to be diminished. The appropriate source is the Permanent Judgment Claims Fund, the permanent appropriations system Congress has established to pay monetary judgements against the United States. Payments from this Fund are not charged to any appropriations subcommittee's allocation.

(The Department's bill does provide for the payments to come from this Fund.)

9. Elimination of stalling tactics. It must eliminate all of the defenses the Justice Department has used to stall trust litigation in the past. In particular, it needs to make it clear, as has earlier legislation, that the Statute of Limitations does not begin to run against trust claims unless and until the Government has provided the beneficiary with an acceptable trust accounting for that year.

(The Department's bill goes in the other direction, seeking, without ever acknowledging it is doing so, to overturn court decisions holding that based on earlier legislation, the Statute of Limitations does not begin to run until the Secretary has provided the account holders with an acceptable trust accounting.)

10. Known errors. The United States must immediately make the tribes whole for the losses they suffered as a result of the known errors identified by Arthur Andersen in its Reconciliation Report. The overpayments resulting from such errors should be written off, as every bank is required to do if it fails to catch overpayment errors within a reasonable period of time.

(The Secretary's bill would net a tribe's overpayments against its underpayments.)

ITMA is committed to working with the Committees and with the Department of Interior to explore this complex issue and develop acceptable legislation that will fairly and expeditiously compensate tribes for their huge losses. We also request the assistance of these Committees to ensure that productive discussions with the Department can begin as soon as possible.

Thank you again for the time and effort you have devoted to this complex and important issue.